defendant's negligence should be submitted to the jury. *Meisle* v. *New York Cent. & H. R. R. Co.* (N. Y. 1916), 114 N. E. 347.

This case is worthy of note, perhaps, principally on account of its peculiar facts, although in the Appellate Division the complaint was dismissed on the ground that there was no evidence to justify a finding that the defendant was negligent, or that it could have anticipated the accident. However, the decision of the Court of Appeals is clearly right. A ferryman, like other common carriers of passengers, is not an insurer of the passenger's safety, but is required to exercise the highest degree of care, skill, and foresight to protect him from injury. *Louisville etc. Ferry Co.* v. *Nolan,* 135 Ind. 60, 34 N. E. 710; *Wyckoff* v. *Queens Co. Ferry Co.,* 52 N. Y. 32, 34, 11 Am. Rep. 650. If the possibility of an accident was clear to the ordinarily prudent eye then it is not necessary that the defendant should have foreseen the particular method in which the accident occurred. *Munsey* v. *Webb,* 231 U. S. 150, 156, 34 Sup. Ct. 44, 45, 58 L. Ed. 162; *Washington & Georgetown R. R. Co.* v. *Hickey,* 166 U. S. 521, 526, 527. It is the duty of a public ferryman to provide suitable guards, barriers and fixtures of all kinds for the security of passengers. *White* v. *Winnisimmet Co.,* 7 Cush. 155; *Whitmore* v. *Bowman,* 4 G. Greene (Iowa) 148; *Sanders* v. *Young,* 38 Tenn. (1 Head) 219, 73 Am. Dec. 175; *Wyckoff* v. *Queens Co. Ferry Co.,* supra.

PLEADING—SPECIAL DEFENSE AS TO SUNDAY CONTRACT.—In an action against a decedent's estate on a note made on Sunday, the defendant pleaded that the note was illegal. After the court had directed a verdict in favor of the plaintiff, the defendant filed a motion in arrest of judgment on the ground that "it conclusively appears from the evidence that if said instrument was executed and delivered by decedent, it was delivered on Sunday, March 1, 1914." No objection was taken to the use of a motion in arrest for an error not apparent of record, but the motion was treated as a motion for a new trial and overruled on the merits. *Held,* that the defense to a note that it was a Sunday contract was a special defense, within CODE SUPP. 1913, § 3340, requiring such defenses to be pleaded, that it was not sufficiently pleaded by the conclusion that "the note is illegal," but the fact that it was made on Sunday must be alleged, and that such defense cannot be raised for the first time on a motion in arrest or for new trial. *Rule* v. *Carey,* (Iowa 1916), 159 N. W. 699.

The same court has gone to the extent of holding that a defendant who has not raised the issue in his answer may properly be denied leave to amend for that purpose pending the trial on the ground that "it is a clear case of a technical defense, provided by the statute in the interest of what is deemed public policy, and barren of justice between the parties," and so not in furtherance of justice as required by the statute relating to amendments. *Chlein* v. *Kabat,* 72 Iowa 291, 33 N. W. 771. Other courts, apparently without being so strict as to amendment, have followed the principal case in requiring a special plea. *Triphonoff* v. *Sweeney,* 65 Ore. 299, 130 Pac. 979; *Raymond* v. *Phipps,* 215 Mass. 559, 102 N. E. 905; *Herndon* v. *Henderson,* 41 Miss. 584; *Power* v. *Brooks,* 7 Ky. Law Rep. 204; *Finley*

v. *Quirk,* 9 Minn. 179, 86 Am. Dec. 93; *Western Union Tel. Co.* v. *Fulling,* 49 Ind. App. 172, 96 N. E. 967. On the other hand, some courts have held that the defense may become available although not pleaded. Thus, in an action to enforce an alleged Sunday contract, the fact that defendant in his answer did not assert the invalidity of the contract because of its execution on Sunday, did not preclude him from thereafter availing himself of such defense. *Pearson* v. *Kelly,* 122 Wis. 660, 100 N. W. 1064; *Jacobson* v. *Bentzler,* 127 Wis. 566, 107 N. W. 7, 4 L. R. A. N. S. 1151, 115 Am. St. Rep. 1052. In *Pearson* v. *Kelly,* supra, the court said, "To entertain such actions would aid the parties to enforce agreements which are repugnant to public policy. Parties to such an agreement are deemed equally guilty in the eye of the law, and must be left to suffer the consequences of their transgression, and meet with the disapproval of the courts in denying them the usual remedies of the law." In this case the defense was allowed on appeal. The holding in the principal case, that the defense of illegality arising from the making of the contract on Sunday is merely a technical matter of pleading, can hardly be reconciled with the general rule that "in an action at law, where the defendant does not set up the defense of the illegality of the contract used on, but such illegality appears from the case as made by either the plaintiff or defendant, it becomes the duty of the court, *sua sponte,* to refuse to entertain the action"; nor with the corollary to that rule, that an appellate court will dismiss an action based on an illegal contract notwithstanding the fact that the question of its legality was not raised in the trial court. *Gravier* v. *Carraby,* 17 La. 132; *Cansler* v. *Penland,* 125 N. C. 578, 34 S. E. 683.

RULE IN SHELLEY'S CASE.—A testator devised property to E. S. "and his male heir forever." On questions arising as to the effect of the devise to E. S., as to whether he took an estate tail, or a fee simple, or a life interest, it was *held,* that the devise fell within the rule of *Shelley's Case* rather than within the rule of *Archer's Case,* for that the words "male heir forever" were words of limitation and not of purchase. *Silcocks* v. *Silcocks* [1916], 2 Ch. 161, 85 L. J. Ch. 464.

Whether a situation was created by the will which brought the rule in *Shelley's Case* into operation depends solely upon what "male heir forever" is taken to mean. Did the testator mean to describe a certain person as the purchaser or did he merely intend to grant the remainder by way of limitation to whomsoever should be the male heir of E. S.? This devise differs in several respects from the usual one upon which the rule in *Shelley's Case* (1581), 1 Co. Rep. 93b, 76 Eng. Rul. Cas. 206, operates. It is to the heir rather than the heirs of E. S. Is this enough to prevent the operation of the rule? No, for in a will the word heir in the singular is primarily one of limitation and not of purchase. *Richards* v. *Bergavenny,* 2 Vern. 324, 23 Eng. Rul. Cas. 810. *Archer's Case* (1597), 1 Co. Rep. 66b, 76 Eng. Rul. Cas. 146, was decided as without the rule in *Shelley's Case,* not only because the remainder was to the next heir male in the singular, but also because of the superadded words of limitation, "to the heirs male of the body of such